

OFFICE OF SPECIAL MASTERS

(Filed: July 29, 2005)

ERICK BENSON and DEJOIRE BENSON,)	
as legal representatives of their daughter,)	
DEJA BENSON,)	
)	
Petitioners,)	
)	
v.)	No. 00-0673V
)	DO NOT PUBLISH
SECRETARY OF)	
HEALTH AND HUMAN SERVICES,)	
)	
Respondent.)	
)	

DECISION (CREDIBILITY RULING/FINDING OF FACT)¹

Petitioners, Erick Benson and Dejoire Benson (Mr. Benson and Ms. Benson or the Bensons), as legal representatives of their daughter, Deja Benson (Deja), seek compensation under the National Vaccine Injury Compensation Program (Program).² Deja was born on November 16, 1997. *See* Petitioners' exhibits (Pet. ex.), filed May 5, 2003, at 14. The Bensons acknowledge that Deja experienced a complicated neonatal course, *see, e.g.*, Transcript (Tr. I), filed December 1, 2004, at 24, 70, 93, 111, 177, 211, including a hospitalization from November 16, 1997, to November 26, 1997, for "cholestatic jaundice" and "mild seizure activity," Pet. ex. at 14; an elective hospitalization from December 15, 1997, to December 17, 1997, for an "exploratory laparotomy" and a "liver biopsy," Pet. ex. at 382; *see also* Pet. ex. at 358, 377; and a hospitalization from December 18, 1997,

¹ As provided by Vaccine Rule 18(b), each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, "the entire decision" will be available to the public. *Id.*

² The statutory provisions governing the Vaccine Program are found in 42 U.S.C. §§ 300aa-10 *et seq.* For convenience, further reference will be to the relevant section of 42 U.S.C.

to December 28, 1997, for seizures that required treatment with “Dilantin, Phenobarbital” and “Ativan,” Pet. ex. at 475, accompanied by “respiratory distress” that required “intubation.” Pet. ex. at 484-85; *see also* Tr. I at 35. Nevertheless, the Bensons assert that Deja was “neurologically fine” between December 28, 1997, and January 14, 1998. Tr. I at 176-78; *see also* Tr. I at 24, 26, 36, 71, 94, 112. Deja received a diphtheria-tetanus-acellular pertussis (DTaP) vaccination on January 14, 1998. *See* Pet. ex. at 1498, 1505. According to the Bensons, Deja exhibited the onset of “infantile spasms” on January 15, 1998. Amended Petition (Am. Pet.), filed May 5, 2003, ¶ 9. Deja suffers now a constellation of very serious neurological symptoms. *See generally* Pet. ex. at 1816-2140. The Bensons relate Deja’s infantile spasms and Deja’s devastating condition to Deja’s January 14, 1998 DTaP vaccination. Am. Pet. ¶ 12.

PROCEDURAL HISTORY

The Bensons pursued initially two distinct legal theories. At the outset, the Bensons presented a legal theory, referred to commonly as a Table claim, that confers a presumption of causation in certain circumstances. *See, e.g.*, Status Report, filed April 5, 2004. In particular, the Bensons maintained that following the administration of a vaccine--*DTaP*--included in the Vaccine Injury Table (Table), 42 C.F.R. § 100.3(a)(II), Deja sustained the first symptom or manifestation of onset of an injury--*encephalopathy*--listed in the Table for DTaP, 42 C.F.R. § 100.3(a)(II)(B), within the period--*72 hours*--contained in the Table for DTaP, *id.*, and that her condition represents the acute complication, sequela or pathological consequence of the encephalopathy, 42 C.F.R. § 100.3(a)(II)(C). *See* § 300aa-11(c)(1)(A)-(C)(i); § 300aa-13(a)(1)(A). In the alternative, the Bensons presented a legal theory based upon traditional tort principles governing actual causation. *See, e.g.*, Status Report, filed August 25, 2003. In particular, the Bensons maintained that “but for” the administration of Deja’s January 14, 1998 DTaP vaccination, Deja would not have been injured, and that Deja’s January 14, 1998 DTaP vaccination was a “substantial factor in bringing about” Deja’s injury. *Shyface v. Secretary of HHS*, 165 F.3d 1344, 1352 (Fed. Cir. 1999).³

After reviewing thoroughly the evidence, and after considering carefully explicit regulatory language, the special master ruled as a matter of law that the Bensons could not “gain the presumption of causation.” *Benson v. Secretary of HHS*, No. 00-0673V, Order Denying Vaccine Injury Table Claim at 3 (Fed. Cl. Spec. Mstr. Apr. 21, 2004). By reference, the special master

³ The Bensons represented expressly that they were not alleging that Deja suffered the “aggravation of an underlying neurological condition.” Tr. I at 94; *see also* Petitioners’ Prehearing Memorandum (P. Memo), filed October 1, 2004 at 4. Rather, the Bensons averred that Deja did not manifest “an underlying neurological condition” before her January 14, 1998 DTaP vaccination. Tr. I at 94; *see also* P. Memo at 4. Thus, the Bensons averred that Deja’s “neurological condition” arose “subsequent to,” and was “caused by,” Deja’s January 14, 1998 DTaP vaccination. Tr. I at 94. *The special master finds that the Bensons have waived explicitly any significant aggravation claim. See Vaccine Rule 8(f).*

incorporates his April 21, 2004 order into this decision. Therefore, the special master limited the Bensons to their alternate theory: actual causation. *Id.*

RESPONDENT'S DEFENSE

Respondent denies that the Bensons are entitled to Program compensation. *See generally* Respondent's Supplemental Rule 4(b) Report (Supp. Report), filed February 6, 2004; Respondent's Prehearing Memorandum (R. Memo), filed September 24, 2004. Respondent contends that Deja's medical records from January 1998 reflect fairly that Deja experienced "the onset of infantile spasms" *before* her January 14, 1998 DTaP vaccination. Supp. Report at 11, citing Pet. ex. at 1166; *see also* R. Memo at 10. Thus, respondent argues that Deja's infantile spasms "cannot be attributed to the receipt of" Deja's January 14, 1998 DTaP vaccination. Supp. Report at 12; *see also* R. Memo at 10. In the alternative, respondent contends that the Bensons have not adduced "sufficient evidence to support their claim that the DTaP vaccine can cause infantile spasms." Supp. Report at 12; *see also* R. Memo at 10.

THE DISPUTED MEDICAL RECORD

On January 27, 1998, Deja presented to Catalina Lim, M.D. (Dr. Lim), at the Kaiser Permanente Fontana Medical Center in Fontana, California, for an outpatient neurology consultation. *See* Pet. ex. at 1191-94; *see also* Pet. ex. at 1166-67. Dr. Lim reviewed Deja's medical history. According to Dr. Lim, Deja had not experienced any seizures following her December 28, 1997 discharge from the hospital. *See* Pet. ex. at 1166, 1193. However, Dr. Lim noted that Deja had displayed certain motor activity. *See* Pet. ex. at 1166, 1193. In particular, Dr. Lim indicated that Ms. Benson "reported seeing some jerks of the upper extremity in either hand" on January 13, 1998. Pet. ex. at 1193; *see also* Pet. ex. at 1166. Dr. Lim indicated also that Ms. Benson reported seeing "a few sudden quick jerks of the legs more than the upper extremities" on January 15, 1998. Pet. ex. at 1193; *see also* Pet. ex. at 1166. Dr. Lim stated that by January 27, 1998, Deja was exhibiting "20 to 30 jerks per day." Pet. ex. at 1193; *see also* Pet. ex. at 1167. Dr. Lim suspected "myoclonic seizure." Pet. ex. at 1193; *see also* Pet. ex. at 1167.

THE FIRST EVIDENTIARY HEARING

The special master convened an evidentiary hearing on October 27 and 28, 2004. The Bensons and their medical expert, Charles Niessen, M.D. (Dr. Niessen), testified during the Bensons' case-in-chief. *See generally* Tr. I. Respondent's medical expert, Robert Baumann, M.D. (Dr. Baumann), testified during respondent's rebuttal case. *See generally* Tr. I.

Ms. Benson was "not sure" when Dr. Lim "came on to Deja's care." Tr. I at 37; *see also* Tr. I at 50-51, 54-55. However, Ms. Benson recalled that the Bensons received a referral to Dr. Lim "to

find out why Deja was jerking.” Tr. I at 37-38; *see also* Tr. I at 49-51. Ms. Benson admitted essentially that she remembered very little about Deja’s January 27, 1998 neurology appointment with Dr. Lim. *See* Tr. I at 38-39, 56-57, 60-62. Nevertheless, Ms. Benson insisted that she did not inform Dr. Lim that Deja had exhibited “activity” like “jerking” on January 13, 1998. Tr. I at 49-51; *see also* Tr. I at 39. Rather, Ms. Benson maintained that she told Dr. Lim that Deja “started jerking” on January 15, 1998. Tr. I at 50-51; *see also* Tr. I at 58. Thus, Ms. Benson declared that she has “no idea” about “what [Dr. Lim’s] note” mentioning January 13, 1998, “means.” Tr. I at 50.

Ms. Benson characterized “some” of Deja’s initial episodes of jerking as “a little subtle.” Tr. I at 29. Ms. Benson explained that, at times, she would “just see [Deja’s] upper body move or something.” *Id.* Ms. Benson said that Deja’s initial episodes of jerking appeared “different every day.” Tr. I at 30.

Mr. Benson did not remember meeting Dr. Lim before January 27, 1998. *See* Tr. I at 74, 85. Mr. Benson recalled that he accompanied his wife and daughter to the January 27, 1998 appointment with Dr. Lim. *See* Tr. I at 73, 85. Mr. Benson offered that his wife did “most of the talking” during Deja’s January 27, 1998 appointment with Dr. Lim. Tr. I at 74. Mr. Benson recounted that his wife related “the whole experience of what had gone on after” Deja’s January 14, 1998 “immunization shot.” *Id.*; *see also* Tr. I at 86. Mr. Benson said that his wife “definitely” did not tell Dr. Lim that Deja exhibited jerking on January 13, 1998. Tr. I at 74; *see also* Tr. I at 86-87. Mr. Benson said also that he did not tell Dr. Lim that Deja exhibited jerking on January 13, 1998. *See* Tr. I at 87. Mr. Benson asserted that “the jerks started right after the immunization.” Tr. I at 87; *see also* Tr. I at 71-72, 74, 76, 85.

Mr. Benson indicated that he and his wife recorded the frequency of Deja’s seizures in “a diary type book.” Tr. I at 87; *see also* Tr. I at 76. Mr. Benson added that he and his wife documented other aspects of Deja’s medical history in the “particular book” so that they could “report certain things to [Deja’s] doctors.” Tr. I at 88. The special master directed the production of the “book” and of any similar item, like a “journal or diary [or] calendar.” Tr. I at 88-89; *see also* Tr. I at 273.

Dr. Baumann opined that the onset of Deja’s “infantile myoclonic seizures” preceded “quite likely” Deja’s January 14, 1998 DTaP vaccination. Tr. I at 211; *see also* Tr. I at 214, 243-44, 253-54; Respondent’s exhibit (R. ex.) B at 2. According to Dr. Baumann, infantile spasms “start subtly.” Tr. I at 220; *see also* Tr. I at 214-15, 241-42, 247-48. And, according to Dr. Baumann, “by the time the child’s having multiple spells a day, the child’s already [had] the seizures for some period of time.” Tr. I at 214; *see also* Tr. I at 215, 220, 241-44, 247-48, 253-54. Moreover, in Dr. Baumann’s view, Dr. Lim was “describing seizures,” Tr. I at 240, in her January 27, 1998 consultation notes reflecting a history of “abnormal movements” on January 13, 1998. Tr. I at 213; *see also* Tr. I at 235; R. ex. B at 2. Dr. Baumann explained that the symptoms depicted in Dr. Lim’s January 27, 1998 consultation notes are consistent with “the sorts of movements” that children display “early” in the course of infantile spasms. Tr. I at 243.

Dr. Niessen agreed that “the onset of infantile spasms can be subtle.” Tr. I at 268; *see also* Tr. I at 263-64. Indeed, Dr. Niessen stated that the onset of infantile spasms may be just “a brief movement” that “sometimes the parents overlook.” Tr. I at 263-64. However, Dr. Niessen suggested that the Bensons were “watching” Deja “very closely” in January 1998 “because she [had] a history of seizure problems.” Tr. I at 263. Thus, Dr. Niessen would credit the Bensons’ current testimony that they “don’t recall any abnormal movements” before January 15, 1998, over Dr. Lim’s January 27, 1998 consultation notes. Tr. I at 265; *see also* Tr. I at 263.

THE BENSONS’ SUPPLEMENTAL DOCUMENTS

On December 22, 2004, the Bensons filed many pages of their contemporaneous notes regarding Deja’s medical care. *See generally* Pet. ex. at 3002-3046. One entry is dated January 14, 1998. *See* Pet. ex. at 3009. The entry is identified as “[f]ollow]-up [with] Dr. Shah,” who was Deja’s primary care physician. *Id.* The entry contains a notation: “hands twitching.” *Id.*

THE SECOND EVIDENTIARY HEARING

After reviewing the documents that the Bensons filed on December 22, 2004, the special master convened a second evidentiary hearing on March 1, 2005. Ms. Benson testified. *See generally* Transcript (Tr. II), filed March 29, 2005. The special master questioned especially Ms. Benson about the entry dated January 14, 1998, in the Bensons’ contemporaneous notes regarding Deja’s medical care. *See* Tr. II at 10-16.

Ms. Benson stated that she prepared the entry dated January 14, 1998, “[b]efore and during” Deja’s January 14, 1998 appointment with Dr. Shah for Deja’s two-month physical examination. Tr. II at 10. Ms. Benson said that her husband wrote portions of the entry dated January 14, 1998, too. *See* Tr. II at 11. Ms. Benson explained that some items in the entry dated January 14, 1998, including the reference to “hands twitching,” were “bullet points” intended to “help [her] remember what to ask” Dr. Shah. Tr. II at 12.

According to Ms. Benson, she, her husband and “hospital staff” had observed Deja’s “hand twitching, or shimmering, or whatever” while Deja was hospitalized for seizures in December 1997. Tr. II at 12-13; *see also* Tr. II at 23. Ms. Benson did not remember asking hospital personnel about the hand twitching during Deja’s December 1997 hospitalization. Tr. II at 14. Yet, Ms. Benson asserted that she wanted Dr. Shah to explain on January 14, 1998, the significance of the hand twitching “that had taken place when [Deja] was in the hospital” in December 1997. Tr. II at 13-14; *see also* Tr. II at 12, 22. Ms. Benson believed that she discussed Deja’s hand twitching with Dr. Shah on January 14, 1998. *See* Tr. II at 15, 23. But, Ms. Benson offered that she was “not sure what was said.” Tr. II at 15.

Ms. Benson insisted that her reference to “hands twitching” in the entry dated January 14, 1998, did not reflect symptoms that were “happening timely.” Tr. II at 13; *see also* Tr. II at 17, 21. Ms. Benson declared that she and her husband “watched [Deja] pretty much like a hawk” between her discharge from the hospital on December 28, 1997, and January 14, 1998. Tr. II at 16-18. Ms. Benson proclaimed that she and her husband “would have called, or taken [Deja] to the doctor” if Deja had exhibited any unusual symptoms between her discharge from the hospital on December 28, 1997, and January 14, 1998. Tr. II at 17. Again, Ms. Benson maintained that Deja “started experiencing these jolts” on January 15, 1998. Tr. II at 20.

DISCUSSION

In *Whitecotton v. Secretary of HHS*, 514 U.S. 268 (1995), the United States Supreme Court announced that “[t]here cannot be two first symptoms or onsets of the same injury.” *Id.* at 274. The Court explained that “[i]f a symptom or manifestation of” a condition “has occurred before a claimant’s vaccination, a symptom or manifestation after the vaccination cannot” be considered the condition’s “onset.” *Id.* The Bensons allege that Deja suffered the onset of infantile spasms leading to her current, devastating neurological condition after she received a DTaP vaccination on January 14, 1998. *See* Am. Pet. ¶¶ 9, 12; P. Memo at 4; Tr. I at 94. Respondent urges that Deja’s medical records and the medical testimony establish that Deja suffered the onset of infantile spasms before she received a DTaP vaccination on January 14, 1998. *See* Supp. Report at 11; R. Memo at 10; Tr. I at 93.

The case presents a potentially-dispositive, narrow, mixed issue of fact and medicine. The special master must decide if there exists a preponderance of the evidence that Deja exhibited “some jerks of the upper extremity in either hand” on January 13, 1998. Pet. ex. at 1193; *see also* Pet. ex. at 1166. If the special master decides by the preponderance of the evidence that Deja exhibited “some jerks of the upper extremity in either hand” on January 13, 1998, Pet. ex. at 1193; *see also* Pet. ex. at 1166, the special master must decide if there exists a preponderance of the evidence that the jerks constitute medically the onset of Deja’s infantile spasms. If the special master decides by the preponderance of the evidence that Deja exhibited “some jerks of the upper extremity in either hand” on January 13, 1998, Pet. ex. at 1193; *see also* Pet. ex. at 1166, and if the special master decides by the preponderance of the evidence that the jerks constitute medically the onset of Deja’s infantile spasms, the special master must conclude ineluctably that Deja suffered the onset of her infantile spasms before her January 14, 1998 DTaP vaccination. *Whitecotton*, 514 U.S. at 274. The Bensons disavow specifically that Deja suffered “an aggravation of an underlying neurological condition.” Tr. I at 94.

The United States Court of Appeals for the Federal Circuit (Federal Circuit) counsels that “[m]edical records, in general, warrant consideration as trustworthy evidence.” *Cucuras v. Secretary of HHS*, 993 F.2d 1525, 1528 (1993). The Federal Circuit explains that “generally contemporaneous” medical records “contain information supplied to or by health professionals to facilitate diagnosis and treatment of medical conditions.” *Id.* Thus, the Federal Circuit recognizes

that “[w]ith proper treatment hanging in the balance, accuracy has an extra premium.” *Id.* Moreover, the Federal Circuit counsels that “oral testimony in conflict with contemporaneous documentary evidence deserves little weight.” *Id.*, citing *United States Gypsum Co.*, 333 U.S. 364, 396 (1947).

The Bensons’ contemporaneous notes regarding Deja’s medical care reveal certainly that sometime before January 14, 1998, the Bensons observed Deja’s “hands twitching.” Pet. ex. at 3009. Indeed, Ms. Benson testified that she intended to discuss the movements with Dr. Shah during Deja’s physical examination on January 14, 1998. *See* Tr. II at 12. Nevertheless, the Bensons deny that the movements occurred between Deja’s discharge from the hospital on December 28, 1997, and January 14, 1998. *See e.g.*, Tr. I at 26, 39, 50-51, 70-71, 74-75, 84; Tr. II at 13, 16-17, 21. Rather, according to Ms. Benson, the movements occurred during Deja’s 10-day hospitalization in December 1997 for seizures. *See* Tr. II at 12-13, 23.

On January 27, 1998, Dr. Lim recorded that Deja exhibited “some jerks of the upper extremity in either hand” on January 13, 1998. Pet. ex. at 1193; *see also* Pet. ex. at 1166. Dr. Lim ascribed the information to Ms. Benson. *See* Pet. ex. at 1193. Nevertheless, the Bensons professed ignorance regarding the source of Dr. Lim’s information. *See* Tr. I at 39, 49-51, 74, 86-87.

At the first evidentiary hearing in October 2004, the special master observed carefully the Bensons during direct examination and cross-examination, interrogated intently the Bensons himself and assessed thoroughly the Bensons’ credibility and demeanor. At the second evidentiary hearing in March 2005, the special master interrogated intently Ms. Benson himself and listened raptly to Ms. Benson’s responses to questions from the Bensons’ counsel. In addition, the special master has considered exhaustively the testimony in the context of the record as a whole.

The Bensons are obviously devoted parents whose priority is Deja’s welfare. However, the special master’s ruling in this case cannot be motivated by the special master’s sympathy for Deja’s plight, or buoyed by the special master’s profound respect for the Bensons’ selfless dedication to Deja’s care. Rather, the special master must base his ruling in this case upon a reasoned, dispassionate evaluation of the evidence. And, the special master harbors fundamental concerns regarding the reliability of the Bensons’ current recollection about events in early 1998.

The special master grants that Deja’s medical records show that some of Deja’s “seizure activity” during Deja’s December 1997 hospitalization involved “twitching” of the “right arm.” Pet. ex. at 475. Yet, the special master is not persuaded by Ms. Benson’s testimony that the reference to “hands twitching” in the entry dated January 14, 1998, in the Bensons’ contemporaneous notes regarding Deja’s medical care relates to movements that the Bensons observed in the hospital more than three weeks before January 14, 1998. Ms. Benson did not recall discussing the movements with medical personnel during Deja’s December 1997 hospitalization. Tr. II at 14. In the special master’s view, Deja’s treating physicians in the hospital, rather than Dr. Shah, would have been naturally the appropriate individuals to ask, and to answer, questions about any “twitching” that Deja exhibited in the hospital. In addition, Ms. Benson stated that she believed that Deja’s condition had resolved

by Deja's discharge from the hospital in December 1997, *see* Tr. I at 36, since she and her husband "didn't want to take a chance on something else happening when [they] got home." Tr. I at 24; *see also* Tr. I at 81. Thus, it does not make sense to the special master that Ms. Benson would have waited more than three weeks to pursue any concerns that the Bensons might have had about "twitching" that Deja exhibited in the hospital.

Regardless, in her notes from Deja's January 27, 1998 neurological consultation, Dr. Lim attributed directly to Ms. Benson a history that Deja had experienced "some jerks of the upper extremity in either hand" on January 13, 1998. Pet. ex. at 1193. Although the Bensons asserted that Dr. Lim was difficult to understand, *see* Tr. I at 56-57, 74-75, Ms. Benson acknowledged that Deja's treating physicians often identify the source of their information in their treatment records. *See* Tr. I at 51. And, focusing solely on Dr. Lim's handwritten record from January 27, 1998, *see* Pet. ex. at 1166, the Bensons did not address Dr. Lim's typewritten record for January 27, 1998, that contains the attribution. Moreover, the special master is extremely troubled by the Bensons' inability to provide substantive details about Deja's January 27, 1998 consultation with Dr. Lim. *See, e.g.,* Tr. I at 38-39, 56-57, 60-62, 73, 85-86. Indeed, Ms. Benson could not remember even whether her husband accompanied her and Deja to the January 27, 1998 appointment with Dr. Lim. *See* Tr. I at 39. The Bensons were sure apparently of just one aspect of the January 27, 1998 consultation with Dr. Lim: They did not tell Dr. Lim that Deja exhibited any jerking on January 13, 1998. *See* Tr. I at 39, 49-51, 74, 86-87. Deja's contemporaneous medical records demonstrate otherwise. Therefore, the special master is not persuaded by the Bensons' testimony. As a consequence, the special master accords greater weight to Dr. Lim's records from the January 27, 1998 outpatient neurological consultation than to the Bensons' current recollection reflected by the Bensons' testimony. Thus, the special master concludes that Deja exhibited "some jerks of the upper extremity in either hand" on January 13, 1998. Pet. ex. at 1193.

According to Dr. Baumann, Deja's symptoms on January 13, 1998, as depicted in Dr. Lim's January 27, 1998 consultation notes, are consistent with "the sorts of movements" that children display "early" in the course of infantile spasms. Tr. I at 243. In addition, according to Dr. Baumann, infantile spasms "start subtly." Tr. I at 220; *see also* Tr. I at 214-15, 241-42, 247-48. Dr. Baumann said that "by the time the child's having multiple spells a day, the child's already [had] the seizures for some period of time." Tr. I at 214; *see also* Tr. I at 215, 220, 241-44, 247-48, 253-54. Based upon his opinion that Deja's movements on January 13, 1998, were "seizures," Tr. I at 240, and based upon Deja's medical records indicating that Deja experienced very noticeable jerking by January 15, 1998, Dr. Baumann asserted that the onset of Deja's "infantile myoclonic seizures" preceded "quite likely" Deja's January 14, 1998 DTaP vaccination. Tr. I at 211; *see also* Tr. I at 214, 243-44, 253-54; Respondent's exhibit (R. ex.) B at 2. Dr. Niessen did not refute really Dr. Baumann's opinion. Rather, Dr. Niessen said that he believed the Bensons' hearing testimony that Deja did not manifest abnormal movements on January 13, 1998. Tr. I at 265; *see also* Tr. I at 263. The special master accepts Dr. Baumann's opinion that Deja's "jerks of the upper extremity in either hand" on January 13, 1998, Pet. ex. at 1193, constitute medically infantile spasms. Likewise, the special master accepts Dr. Baumann's opinion that the onset of Deja's infantile spasms occurred before January 14, 1998.

CONCLUSION

The special master is entirely sympathetic to the Bensons' and Deja's tragic circumstances. However, based on the record before him, the special master determines as a matter of fact that Deja's infantile spasms commenced before Deja's January 14, 1998 DTaP vaccination. Thus, the special master holds that Deja did not sustain the first symptom or manifestation of her current condition following her January 14, 1998 DTaP vaccination. *See Whitecotton*, 514 U.S. at 274. And, as the special master has found, the Bensons have waived explicitly any significant aggravation claim. *See* Tr. I at 94; P. Memo at 4. Thus, the special master is constrained to conclude that the Bensons are not entitled to Program compensation. Therefore, in the absence of a motion for review filed under RCFC Appendix B, the clerk of court shall enter judgment dismissing the petition.

The clerk of court shall send the Bensons' copy of this decision to the Bensons by overnight express delivery.

John F. Edwards
Special Master